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WESTERN DISTRICT OF TEXAS
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
DEL RIO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**Criminal No. DR-18-CR-00079-AM**
	§	
JACK CARLTON WILKIN, JR.,	§	
Defendant.	§	

ORDER

Pending before the Court is the Defendant's Motion to Suppress. (ECF No. 18.) The Court has reviewed the parties' briefs, (ECF Nos. 18, 21, 42, 44.), and has heard the evidence and the arguments adduced at a hearing held on August 29, 2018. Having considered all relevant facts and legal arguments, the Court has determined that the Defendant's Motion to Suppress (ECF Nos. 18, 42.) should be **DENIED**.

I. FACTUAL FINDINGS

On December 19, 2017, Border Patrol Agents Miller and Martinez were monitoring traffic as part of their roving patrol duties at the intersection of Farm-to-Market Road 1021 ("1021") and Farm-to-Market Road 2644 ("2644").[1] The intersection is south of Eagle Pass, Texas near El Indio, Texas. While in parked at the intersection, both agents observed a silver Nissan Altima pass their location at approximately 5:00 a.m. driving southbound on 1021, away from Eagle Pass. Agents Miller and Martinez patrolled this area regularly during each of their eleven-year careers. In the agents' experience, there are very few small sized vehicles traveling on 1021 at that time of day. Agents assigned to the area typically see traffic associated with large oil field machinery or local ranches on that particular stretch of road. The agents'

[1] This intersection is approximately two to three miles from the Rio Grande River, the international boundary between the United States and Mexico.

suspicions were aroused when the same Altima abruptly changed direction and, again, crossed paths with the agents within a five-to-ten minute timeframe.

Agents Miller and Martinez performed a registration check on the car and learned it was registered to Walter Henderson in San Marcos, Texas, which is over three hours away from the location of the agents and the car. The registration check did not show any current crossings from the Republic of Mexico into the United States.

Once the registration check came back, Agents Miller and Martinez believed they had reasonable suspicion to conduct an immigration stop. Both agents based their beliefs on a lack of familiarity with codefendant's Altima, the road upon which the car was traveling, the quick turn-around of the car in opposite direction, the very close proximity to the border, and the car's registration in San Marcos, Texas. Each agent testified that their decisions to stop the car were also based on their professional knowledge and experience, as well as, the characteristics and traffic patterns of the area at the particular time of the early morning. Both agents' professional experiences made them aware that alien smuggling activity occurs with frequency in this part of Texas, and that while this route was not the most direct route from Eagle Pass to San Marcos, it could be used to circumvent Border Patrol checkpoints.

After stopping the car, Agent Martinez approached the driver's[2] side of the car, while Agent Miller approached the passenger side where the Defendant was seated. Agent Miller asked the Defendant to roll down the window to obtain his identification. When the window opened, Agent Miller could smell a strong scent of burnt marijuana emanating from the car. Agent Miller proceeded back to his service vehicle to run identification checks while Agent Martinez stayed with the passengers of the car, and continued the interview process with the driver and the Defendant. The driver and the Defendant told Agent Martinez that they were

[2] The driver was identified as Tina Miller and is not a party to the present motion to suppress.

looking for the Kickapoo casino and had been lost for seven hours. The statements did not make sense to Agent Martinez since most people have cell phones with navigation capabilities and do usually not remain lost for seven hours. The driver originally told Agent Martinez that she did not know the Defendant, but that the Defendant was a friend of her "ex," but later stated they did not know each other at all.

The identification check revealed that the Defendant had an outstanding warrant for the distribution of drugs. Agent Miller returned to the car and advised the Defendant about the warrant, asked him to get out of the car, and placed handcuffs on the Defendant. The Defendant made statements to Agent Miller that he did not do anything and asked why he had to get out of the car. The Defendant then complained that he was diabetic, collapsed on his knees, and laid down on the road. Agent Miller thought this was strange since the Defendant had previously been calm, laughing, and conversing with the agents without incident; however, Agent Miller took the Defendant's complaints seriously and called for medical assistance. An EMT arrived within two to three minutes after the call. Agent Miller removed the Defendant's handcuffs for the EMT to conduct an evaluation and stayed with the Defendant for security purposes since the handcuffs were removed.

Agent Miller also requested a K9 unit after he called for the EMT. Agent Aguilar arrived on the scene with K9 Chuck, approximately 20-25 minutes after receiving the call. The medical examination of the Defendant was still ongoing when the K9 unit arrived. Agent Aguilar had over twelve years of experience as a canine handler and worked with K9 Chuck for the six years prior to the search of the Altima. K9 Chuck was trained to alert to concealed humans and controlled substances. Agent Aguilar asked the driver of the car for consent to conduct a K9 search of the car. The driver consented, even though it was an open-air sniff search. Agent

Aguilar also noticed the smell of marijuana as he approached the car. The K9 alerted to the passenger side window and to the driver side window. The K9 entered the car and alerted to a red backpack on the back seat. Agent Aguilar asked the driver of the car if he could search the bag and she consented; however, the driver stated the bag was not hers, that it belonged to the Defendant. The agents did not ask for consent from the Defendant at this point since he still appeared to be under a medical evaluation, and stayed away from him. The agents found a Tupperware bowl inside the red backpack with a crystal substance inside that later tested positive for the presence of methamphetamine. There was also a large amount of marijuana residue present in the bag. Knives were also found all over the car. Agents also discovered marijuana on the floorboards of the driver and passenger sides, the center console, and in the backseat of the car. The was Defendant was transported to a medical center while the search of the car was still ongoing.

The Defendant's Motion to Suppress asserts that agents lacked reasonable suspicion to conduct a roving patrol stop of the car. (ECF No. 18.) The Defendant claims that the agents did not have sufficient articulable facts that would rise to the level of reasonable suspicion of an immigration violation. (*Id.* at 4-5.) The Defendant also contends that, since the agents did not have reasonable suspicion to initiate the immigration stop, the Defendant's Fourth Amendment right against unlawful seizures was violated. (*Id.* at 6.) Consequently, the Defendant claims evidence resulting from the encounter is fruit of the poisonous tree, and should be suppressed. (*Id.* at 7.) Finally, the Defendant challenges the consent to search the car, claiming it was not freely or voluntarily given. (*Id.*)

In response to the Motion to Suppress, the Government asserts that the stop of the Defendant's car was founded on reasonable suspicion. (ECF No. 21.) The Government argues

that agents were aware of specific articulable facts based on their observations and, from those facts, made rational inferences based on their prior experience as Border Patrol Agents. It argues that those facts and rational inferences ultimately and justifiably led the agents to have a reasonable suspicion that the Defendant was engaged in illegal conduct. (*Id.* at 5-12.) The Government asserts that consent was given voluntarily, free of any coercion. (*Id.* at 15-16.)

On August 29, 2018, this Court held a hearing where both parties presented their testimony and evidence in support of their motions. At the conclusion of the hearing, the Court posed the additional legal issue of inevitable discovery to both parties for argument and allowed additional time for each side to brief this question posed by the Court.

II. ANALYSIS

"The Fourth Amendment guarantees individuals the right 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *United States v. Macias*, 658 F.3d 509, 517 (5th Cir. 2011) (quoting U.S. Const. amend. IV). A vehicle stop and detention of its occupants constitutes a Fourth Amendment seizure. *Id.* "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978). Although the Fourth Amendment does not protect a passenger contesting the search of a vehicle when neither a property nor possessory interest in the vehicle is asserted, *United States v. Iraheta*, 764 F.3d 455, 461 (5th Cir. 2014), a passenger has standing to challenge the legality of a vehicle stop and the seizure of his person. *See United States v. Roberson*, 6 F.3d 1088, 1091 (5th Cir. 1993).

Here, as a passenger of the vehicle stopped by agents, the Defendant has standing to object to the legality of the stop, and the search and seizure of his person. *See United States v.*

Lara, 271 F. App'x 404, 405 (5th Cir. 2008) (per curiam).

The seminal case, *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968), established the standard used to analyze the legality of traffic stops for Fourth Amendment purposes. *Terry* instructs the Court to conduct a two-part inquiry. *Id.* First, the Court must determine "whether the officer's action was justified at its inception[.]" *Id.* at 20. And second, "whether [the agents' actions] were reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*

A. Reasonable Suspicion was Present to Justify the Stop of the Vehicle

To find the agents' stop of the vehicle constitutional, it must have been based on reasonable suspicion. "To temporarily detain a vehicle for investigatory purposes, a Border Patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." *United States v. Chavez-Chavez*, 205 F.3d 145, 147 (5th Cir. 2000) (citing *United States v. Inocencio*, 40 F.3d 716, 722 (5th Cir. 1984)). "Reasonable suspicion requires more than merely an unparticularized hunch, but considerably less than proof of wrongdoing by a preponderance of the evidence." *United States v. Gonzalez*, 190 F.3d 668, 671 (5th Cir. 1999). The reasonableness of a stop is determined by examining the totality of the circumstances. *See United States v. Rodriguez*, 564 F.3d 735, 741 (5th Cir. 2009).

Specifically applied to the border areas, the courts have identified several factors relevant to determining the reasonableness of an investigatory stop, including: (1) proximity to the border; (2) characteristics of the area; (3) traffic patterns; (4) the agent's experience in detecting illegal activity; (5) the behavior of the driver; (6) the particular characteristics of the vehicle; (7)

information about recent illegal trafficking in aliens or narcotics in the area; and (8) the number, appearance, and behavior of the passengers. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *see also Rodriguez*, 564 F.3d at 741. "Proximity to the border is 'a "paramount factor" in determining reasonable suspicion.'" *United States v. Garza*, 727 F.3d 436, 441 (5th Cir. 2013) (quoting *United States v. Zapata-Ibarra*, 212 F.3d 877, 882 (5th Cir. 2000)). "Anything less than 50 miles therefore implicates the proximity factor." *Garza*, 727 F.3d at 441. However, no single fact is dispositive, and each case must be examined based on the totality of the circumstances known to the agents at the time of the stop and their experience in evaluating such circumstances. *See United States v. Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001).

In the present case, both agents testified that the Defendant was initially observed in a car traveling within two to three miles from the border between the United States and Mexico. The car in which the Defendant was a passenger was well within fifty miles of the border when Border Patrol agents began to follow the vehicle and conducted the immigration stop.

The intersection of FM 1021 and FM 2644 is in an area of travel that is known by Border Patrol agents for alien and narcotic smuggling, since it is a route used to circumvent permanent Border Patrol checkpoints in the area. Both Border Patrol agents testified that this particular area was not a direct route and smuggling activities frequently occur along this stretch of road due to the lack of permanent checkpoints.

The roads leading to this particular intersection do not traverse through any major cities or towns, have no business or leisure activities along the routes, and each agent testified based on their experience, that it is mostly used by individuals accessing the ranches along the road or used by oil and gas tankers and heavy-duty vehicles, especially at that time of day. Agents Martinez and Miller testified that the silver Nissan in which the Defendant was a passenger did

not fit the road's normal traffic patterns.

Agent Miller had eleven years of experience with Border Patrol and had spent that time stationed in the Del Rio and Eagle Pass, Texas area. Likewise, Agent Martinez had been an agent with Border Patrol for almost eleven years and also spent that time stationed in the Eagle Pass area. Each agent had a considerable amount of experience conducting roving patrols along this stretch of road which led them to learn the characteristics of the patrol area through their years of experience patrolling the area. They knew from experience that these roads were used to circumvent checkpoints on Highway 57 and the tactical checkpoint on FM 2644. Agents know that smuggling organizations will scout the area to determine if the tactical checkpoint on FM 2644 is operational. The checkpoint was down on this particular morning. The agents testified that the time of day was also significant because it was close to "shift change" for agents and there was usually an increase in smuggling activities at this time of day. Smugglers exploit shift change to their advantage because it takes some time for patrol units to get into place and there can be a lapse of time when there are no agents in the area. Smugglers wait for this lack of law enforcement presence to conduct their nefarious activities.

Agent Martinez and Agent Miller testified the most striking factor which caught their attention was the quick turn-around time in opposing directions in which the car traveled. The vehicle was originally heading southbound when it passed the agents' location. It made an abrupt change in direction and was seen again approximately five to ten minutes later traveling northbound and, again passed the agents' location. The agents decided to follow the car and ran a registration check which came back as registered out of San Marcos, Texas, approximately three hours away. Agent Miller testified that the abrupt change in the direction of travel played a large role in conducting a stop. Agent Miller claimed this was a red flag for possible smuggling

activities because of the close proximity to the river that the vehicle may have been looking for a landmark of some type to pick up aliens or a narcotics drop.

Although there were not any specific reports about illegal activities with this particular vehicle, once the car came to a stop and agents began questioning the driver, the driver's statements did not make sense to the agents. The driver originally told Agent Martinez that the Defendant was a friend of her "ex," then later recanted that statement and said they did not know each other. Agent Martinez testified that both the driver and the Defendant claimed they were lost for seven hours, which was unbelievable to Agent Martinez, given the GPS capabilities on cell phones.

After weighing the totality of the circumstances, including the information available to agents conducting the stop, this Court finds that Agent Martinez and Agent Miller had reliable and credible information and a reasonable suspicion to stop the car in which the Defendant was a passenger. The agents observed the car and pulled it over within approximately two to three miles from the border. The area in which the stop was executed is a known narcotics and alien smuggling route used to avoid permanent Border Patrol checkpoints. The usual traffic pattern for this particular stretch of road includes ranch vehicles and heavy-duty oil trucks, and it was within both agents' professional experience that sedans, like the one presently in question, were not of the type that fit the normal traffic characteristics of the area. Agent Martinez and Agent Miller were well aware from their professional experience and training that this section of road was used as a smuggling route. The driver's quick turn-around and inconsistent direction of travel also aroused agents' suspicions of possible smuggling activities. Although the appearance of the car itself did not provide a complete picture as to how many passengers were in the car, the specific articulable facts provided by Agent Martinez and Agent Miller established that under

the totality of the circumstances, agents had a reasonable suspicion that the Defendant was engaged in illegal activity.

B. The Agents' Actions Were Reasonably Related in Scope to the Circumstances that Justified the Stop

Reasonable suspicion of criminal activity unrelated to the initial stop of a vehicle suffices to prolong a detention without violating the Fourth Amendment. *Macias*, 658 F.3d at 517. Reasonable suspicion exists when the detaining officer can point to specific and articulable facts that, when taken together with rational inferences from those facts, reasonably warrant the . . . seizure." *United States v. Estrada*, 459 F.3d 627, 631 (5th Cir.2006). When an officer has reasonable suspicion that additional criminal activity is afoot, "he may further detain the vehicle's occupants 'for a reasonable time while appropriately attempting to dispel this reasonable suspicion.'" *Id.* (quoting *United States v. Pack*, 612 F.3d 341, 350 (5th Cir. 2010), *modified on denial of reh'g*, 622 F.3d 383 (5th Cir. 2010)).

There is no question that the agents' actions were reasonably related to the circumstances that justified the stop. Agent Miller could smell marijuana odor emanating from the vehicle when the windows were lowered. Agent Miller then ran identification checks on the occupants as part of the initial stop procedure. The records check revealed the Defendant had an outstanding warrant for the distribution of drugs. Additionally, while Agent Miller ran the records check, Agent Martinez continued talking with the driver and the Defendant. Both the driver and the Defendant made statements to Agent Martinez that they had been lost for seven hours looking for a casino. As Agent Martinez testified, their statements did not seem logical that they would remain lost for seven hours when phones are equipped with GPS capabilities. The driver also claimed she didn't even know the Defendant. All of these factors certainly rise to a level of reasonable suspicion that additional drug-related criminal activity could be

occurring and warranted the agents' additional actions during the stop.

It was also due to the Defendant's own actions that the stop was prolonged. Agent Miller advised the Defendant about the warrant and asked him to step out of the vehicle to place him under arrest. It was at this point the Defendant claimed he was diabetic and collapsed on the road without warning or any previous complaints of discomfort. Although Agent Miller thought the Defendant's actions were strange since they had been conversing without incident, Agent Miller took the complaint seriously and called for medical assistance. Within mere minutes, an ambulance arrived on the scene and began to evaluate the Defendant. It was after the call for medical assistance that Agent Miller also called for a K9 unit. Although the K9 unit took approximately 20 to 25 minutes to arrive, the Defendant's medical exam was still taking place by the EMT when the K9 arrived. The delay was not unreasonable to the Defendant and the Court finds it was not an unjustified or prolonged stop. The Court finds the agents' actions were reasonably related in scope to the circumstances that justified the stop.

C. Consent to Search

The Court must consider "four distinct issues" when reviewing whether a search was justified by consent: (1) that consent was given; (2) that consent was voluntary; (3) that the search was within the scope of the consent; and (4) that the consenting individual had authority to consent. *United States v. Freeman*, 482 F.3d 829, 831–32 (5th Cir. 2007). "Existence [and voluntariness] of consent [are] determined based on the totality of the circumstances." *Id.* But the latter two issues, scope and authority, are determined by a "reasonable-officer standard." *Id.* at 832 (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). The burden of proof is on the Government to show consent. *Freeman*, 482 F.3d at 832.

The Court must consider the following six factors to determine whether voluntary

consent was provided:

(1) The voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found. *Id.* No single factor is dispositive or controlling. *Id.*

A drug-dog sniff is generally not a search under the Fourth Amendment, and Border Patrol agents may conduct a drug-dog sniff outside of a vehicle if the stop is not lengthened. *See United States v. Machuca*-Barrera, 261 F.3d 425, 432 n.21 (5th Cir. 2001); *see also United States v. Beene*, 818 F.3d 157, 162 (5th Cir. 2016) (noting that "[a] dog sniff is typically not a search; it may be conducted even when a detention is not drug-related so long as it does not unreasonably prolong the detention").

"We have repeatedly affirmed that an alert by a drug-detecting dog provides probable cause to search." *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003).

At the time of the driver's consent to search, she was not in custody, but on the side of the road while the Defendant received medical treatment. There was no indication by agents that the driver was not free to leave. The Defendant offered no evidence of coercion during the hearing nor any evidence that the driver was not of average intelligence. The driver remained cooperative with agents at all times, and although she was not specifically informed by agents that consent could be denied, this is "not to be given controlling significance." *Freeman*, 482 F.3d at 833 (quoting United States v. Watson, 423 U.S. 411, 425, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976)). Further, the driver did not seem concerned that agents would find incriminating evidence against her since the backpack did not belong to her.

The agents simply asked the driver for consent to search the car. The driver acted freely with her decision and voluntarily gave consent to agents to search the car. Consent may be valid even if the consenting party is not the true owner of the property. *Freeman*, 482 F.3d at 834 ("The government must demonstrate that the officers reasonably (though erroneously) believed that the person who has consented to their search had authority to do so.") (internal quotation marks omitted). The Court finds that the driver provided consent voluntarily to search the car. Additionally, the Defendant failed to provide any evidence of an reasonable expectation of privacy in the car, therefore lacked standing to complain of the search of the car.

What is even more dispositive of the issue of consent is that a K9 unit was on the scene before verbal consent was asked of the driver. It is well-established that an open-air dog sniff is not a search, especially if the stop is not lengthened in time to conduct the sniff. Consent is not needed for a dog sniff to occur and the Fourth Amendment's protections are not implicated under such circumstances. The Defendant was still receiving medical treatment on the scene when the K9 unit arrived. The Court finds there is no question that the dog sniff did not prolong the stop. The K9 agent alerted to both the passenger and driver side windows. The dog then went inside the vehicle and alerted to the backpack inside the vehicle. As discussed above, the Court finds the positive alert of the K9 agent to the Defendant's backpack provided probable cause to search, regardless of consent.

D. Inevitable Discovery

The inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. *Utah v. Strieff*, 136 S.Ct. 2056 (2016) (citing *Nix v. Williams*, 467 U.S. 431, 443–444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). In order for the inevitable discovery exception "to apply, the government must, by a preponderance

of the evidence, establish (1) a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of the police misconduct and (2) that the government was actively pursuing a 'substantial alternate line of investigation at the time of the constitutional violation.'" *U.S. v. Lamas*, 930 F.2d 1099, 1102 (5th Cir. 1991) (quoting *United States v. Cherry*, 759 F.2d 1196, 1205–06 (5th Cir.1985), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987)).

In the present case, the testimony adduced during the hearing showed that the Defendant had an outstanding warrant for a drug related offense. The agents discovered this fact within the first few minutes of the initial stop of the car. Agent Miller testified that once he learned of the outstanding warrant, he was going to take the Defendant into custody and arrest him. At this point, Agent Miller was actively pursuing a substantial alternate line of investigation. As soon as Agent Miller went back to the car, he informed the Defendant about the warrant, asked the Defendant to get out of the car, and placed him in handcuffs. It was at this moment that the Defendant made statements requesting medical assistance. Agents complied with the purported medical needs of the Defendant and removed his handcuffs so medical personnel could examine the Defendant. However, had the Defendant not complained of such medical needs, the backpack inside the car that belonged to the Defendant would have been lawfully searched incident to the Defendant's arrest. Once the backpack was taken into custody, it would have been searched to take inventory of its contents. The presence of the illegal methamphetamine would have inevitably been discovered during the search of the backpack. If the search had been found unlawful, the Court finds the inevitable discovery doctrine would apply. Therefore, the contents of the Defendant's backpack are not be suppressed.[3]

[3] The Defendant additionally claims in his supplemental brief that Agent Aguilar's testimony should be stricken or treated suspect for a violation of "The Rule." This is unfounded and outside the scope of what the Court ordered

III. CONCLUSION

For these reasons, the Defendant's Motion to Suppress (ECF No. 18) is hereby **DENIED**.

SIGNED and ENTERED on this 1st day of November, 2019.

ALIA MOSES
United States District Judge

each party to address in supplemental briefs. This issue was discussed on the record during the hearing and the Court made a finding that witnesses did not knowingly violate provisions of "The Rule." The Defendant's contention is without merit.